

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CARLO MCINTOSH,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. CV 17-04702-JAK (RAO)

**ORDER ACCEPTING REPORT
AND RECOMMENDATION OF
UNITED STATES MAGISTRATE
JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed Plaintiff's Complaint, all of the other records and files herein, and the Magistrate Judge's Report and Recommendation ("Report") issued on July 3, 2018. Dkt. 25. The Court has also conducted a *de novo* review of those portions of the Report to which the Commissioner has objected. This Order addresses those four objections.

First, the Commissioner objects to the Report's reliance on *Webb v. Barnhart*, 433 F.3d 683 (9th Cir. 2005), and contends that it is factually distinguishable. Objections, Dkt. 26 at 3. This argument is unpersuasive. The Report cites *Webb* only as to the legal standard that applies with respect to the

1 finding of a severe impairment at step two. That citation is not dependent on the
2 facts presented in *Webb*. Thus, even assuming that the facts presented in *Webb* are
3 different from those at issue here, that would not affect its precedential effect as to
4 the controlling legal standards. *See* Report at 5, 14.

5 *Second*, the Commissioner cites the opinions of the state agency medical
6 consultants, and states that they are inconsistent with the opinion of Dr.
7 Malinowski, who was the examining psychologist. *See* Objections at 4-5. The
8 Commissioner contends that, in light of these conflicting opinions, the Magistrate
9 Judge applied the wrong legal standard in assessing the evaluation by the ALJ of
10 Dr. Malinowski's opinion. *See id.* This objection is without force. As the
11 Commissioner concedes (*id.* at 4), the ALJ did not discuss the opinions of the state
12 agency medical consultants. Therefore, the reviewing court cannot affirm that
13 administrative decision based on such opinions or by making independent findings
14 or relying on evidence that was not addressed by the ALJ. *See Connett v. Barnhart*,
15 340 F.3d 871, 874 (9th Cir. 2003). The ALJ discussed and weighed only the
16 opinions of Dr. Malinowski and Dr. Borden, a medical expert who provided
17 limited, non-conflicting testimony at the administrative hearing. *See* Report at 9-
18 10. Therefore, the Report correctly applied the "clear and convincing" standard
19 when it considered the reasons stated by the ALJ for placing little weight on the
20 opinion of Dr. Malinowski.

21 *Third*, the Commissioner argues that the reliance by the Magistrate Judge on
22 *Edlund v. Massanari*, 253 F.3d 1152 (9th Cir. 2001), was "misguided." In support
23 of this position, the Commissioner argues that, unlike the physician in *Edlund*, Dr.
24 Malinowski was unaware of Plaintiff's substance abuse. Objections at 5-6. This
25 position is not supported by the record. Indeed, the record shows that Dr.
26 Malinowski noted a diagnosis for Plaintiff of polysubstance dependence,
27 recognized that Plaintiff was "[c]urrently sober," and recommended that Plaintiff
28 "[c]ontinue sobriety through support groups [and] sober living environments" along

1 with positive activities to reduce his risk of substance use. Administrative Record
2 (“AR”) at 596. The Commissioner contends that Dr. Malinowski’s failure to
3 question Plaintiff’s representation of sobriety was a valid reason to reject Dr.
4 Malinowski’s opinion. Objections at 6. However, as the Report notes (Report at
5 10), neither speculation by the ALJ with respect to Plaintiff’s drug use, nor his
6 doubts about Plaintiff’s overall credibility, is a sufficient basis to reject Dr.
7 Malinowski’s opinion. *See Edlund*, 253 F.3d at 1159.

8 *Finally*, the Commissioner observes that the record includes several
9 inconsistent statements by Plaintiff that support the ALJ’s finding that he lacked
10 credibility. *See* Objections at 6-7. The Commissioner contends that the one
11 inconsistent statement identified by the ALJ was cited “as an example among
12 others.” *Id.* at 7. The Commissioner adds that Plaintiff also made inconsistent
13 statements as to refusing medication and reporting that he was stable. Therefore, the
14 Commissioner argues that “this is not a case of an isolated discrepancy in Plaintiff
15 statements as the [Report] appears to suggest.” *Id.* This argument fails because the
16 ALJ did not rely on those alleged inconsistent statements to support the finding that
17 Plaintiff lacked credibility. Nor are these statements relevant to the finding by the
18 ALJ that Plaintiff gave “inconsistent report[s] regarding the history of his
19 polysubstance abuse and dependence.” AR at 16. *See Orn v. Astrue*, 495 F.3d 625,
20 630 (9th Cir. 2007) (a court may review only “the reasons provided by the ALJ in
21 the disability determination and may not affirm the ALJ on a ground upon which he
22 did not rely”).

23
24 *

*


*

25
26 For the reasons stated in this Order, the objections of the Commissioner are
27 overruled, and the findings, conclusions, and recommendations of the Magistrate
28 Judge are accepted and adopted. Therefore, the decision of the Commissioner of

1 Social Security is reversed and the matter is remanded for further administrative
2 action consistent with this Order.

3 IT IS SO ORDERED.

4
5
6 Date: November 13, 2018



JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE